



BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 150 – MOTION FORM

THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.: 18511A

Motion of: ☐ Applicant ☐ Petitioner ☐ Appellant ☒ Party ☐ Intervenor ☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Dismiss, or in the alternative deny, the Applicant's request for an extension of the validity of the Order in BZA no. 18511.

Points and Authorities:

Please state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form.

1. Applicant has failed to demonstrate "that there is good cause for such extension with substantial evidence" of any of the criteria set forth in 11 DCMR § 3130.6(c).
2. Applicant's parallel submission of BZA no. 18511B demonstrates that the requirement of 11 DMCR § 3130.6(b) is not met, inasmuch as there has been a substantial change in "the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application".
3. Arguments in support of this motion are set out in an attached document.

CERTIFICATE OF SERVICE

I hereby certify that on this 20 20 day of March Month, 2016

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:

☐ Mailed letter ☐ Hand delivery ☒ E-Mail ☐ Other _____

Signature:

Print Name: Frank Proschan

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Board of Zoning Adjustment
District of Columbia
CASE NO. 18511A
EXHIBIT NO.12

BZA APPLICATION NO. 18511A

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

**MOTION OF FRANK PROSCHAN¹ TO DISMISS THE APPLICATION FOR
EXTENSION OF THE VALIDITY OF BZA ORDER NO. 18511 OR, IN THE
ALTERNATIVE, STATEMENT OF OPPOSITION**

I. Introduction.

On December 17, 2012, Alleyoop, LLC (the "Applicant"), the owner of 1018 Irving Street N.W. (the "Property"), filed an application with the Board of Zoning Adjustment (the "Board") for zoning relief. On May 7, 2013, the Applicant filed an Amended and Restated Application, which among other things called for elimination of the proposed residential use, a reduction in height, and the subdivision of the property into three lots to accommodate the proposed uses. By its order dated January 13, 2014 (the "Order", BZA No. 18511A, Exhibit 6), the Board approved the Amended and Restated Application and granted the variances requested, in order "to allow the Applicant to subdivide an alley lot into three separate lots and convert an existing automotive repair shop to an office use and two artist studios in the R-4 District at premises rear 1018 Irving Street, N.W. (Square 2851, Lot 837)" (BZA No. 18511A, Exhibit 5). That Order entered into effect on January 23, 2014.

On January 7, 2016, the Applicant submitted an application for a time extension on the validity of the Order (the "Application for Extension"), which would otherwise have expired

¹ The author of this motion has requested Party status in the present case (BZA No. 18511A, Exhibit 10), with the understanding that such status will not be determined by the Board until the beginning of its Public Meeting.

on January 23, 2016. In a letter submitted that same date by its representative, attorney Martin P. Sullivan, the Applicant asserted that it “is having trouble finding tenants for the two artists’ studios. That search is proceeding, but has not been completed yet. More time is needed to find an appropriate tenant or an alternative solution” (BZA No. 18511A, Exhibit 6). That same letter asserted that “There is no substantial change in any of the material facts upon which the Board based its original approval of the Application” and that “there is good cause for the extension due to the inability to secure a tenant due to the current economic and market conditions beyond the Applicant’s reasonable control” (ibid.).

Between January 7, 2016 and this date (March 22, 2016), the Applicant has not filed with the Board “any additional statements, information, briefs, reports (including reports or statements of expert and other witnesses), plans, or other material that the applicant may wish to offer into evidence at the hearing” (11 DCMR § 3113.8) that would constitute “substantial evidence” to demonstrate that any of the relevant criteria for extension are satisfied, as set out in 11 DCMR § 3130.6(c). The Application for Extension should therefore be dismissed because the Applicant has failed to meet its burden of proof.

Moreover, the Applicant’s subsequent submission of BZA application 18511B on the immediately following day, January 8, 2016, would have the effect of substantially changing the previously approved development by substituting residential use for the matter-of-right artist studios and increasing the structures’ height. The Application for Extension should therefore be dismissed because it does not satisfy the requirement of 11 DCMR § 3130.6(b) that “There is no substantial change in any of the material facts

upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application."

Alternatively, in the event that the Board does not wish to dismiss the Application for Extension, it should be denied for the reasons set out below.

II. Failure to provide "substantial evidence" to demonstrate good cause for an extension.

The District of Columbia Zoning Regulations provide that "In all appeals and applications, the burden of proof shall rest with the appellant or applicant" (11 DCMR § 3119.2). As of this writing, the Applicant has offered no proof to justify its stated basis for an extension. Even that basis is attenuated, not directly addressing any of the three criteria for an extension set forth in 11 DCMR § 3130.6(c).

In his letter of January 7, 2016, the Applicant's representative, Mr. Sullivan, asserts that an extension is warranted by the Applicant's difficulty in finding tenants for the artist studios. However, such a difficulty is not among the three criteria set out in 11 DCMR § 3130.6(c). Arguably, one could speculate that difficulty in finding tenants is somehow related to "an inability to obtain sufficient project financing" (11 DCMR § 3130.6(c)(1)), but the Applicant fails even to assert such a connection, let alone to demonstrate it with sufficient evidence.

The District of Columbia Office of Planning, in its report of January 19, 2016 on the Application for Extension (the "OP Report"), pointed out that the Applicant's indications were not sufficient. It noted that "the applicant should provide the normally submitted,

more robust indication of their efforts to lease the space as permitted” (BZA No. 18511A, Exhibit 8). When the case came up before the Board at its Public Meeting of January 26, 2016, Chairperson Heath reiterated this point: “the Board as well as the Office of Planning would like to request that the applicant provide more information on what they’ve done, what efforts they’ve made so far in order to try to secure tenants so that we have a little bit more backup and justification for granting the extension” (Transcript of Board of Zoning Adjustment Public Meeting & Hearing of January 26, 2016). She also requested specifically that this be done “*prior to the next hearing or meeting date*” (emphasis added).

Chairperson Heath returned again to this point a few moments later, addressing the Applicant’s representative, Mr. Sullivan:

CHAIRPERSON HEATH: And then if you could also work on getting us proof of what’s been done to secure tenants.

MR. SULLIVAN: More information.

CHAIRPERSON HEATH: Right.

MR. SULLIVAN: Yeah.

CHAIRPERSON HEATH: That would be helpful.

MR. SULLIVAN: Got it. Yeah, thank you. (ibid.)

At the monthly Public Meeting of ANC 1A on March 9, 2016, the Applicant acknowledged that there was as yet no substantial evidence on file with the D.C. Office of Zoning to support its Application for Extension, but promised that such evidence would certainly be submitted prior to March 15, 2016, fourteen days before the matter comes before the

Board. Nevertheless, as of today (March 22, 2016), no such information has been submitted.

In the absence of such “substantial evidence”, the Office of Planning, ANC 1A, other parties and persons, and the Board itself cannot ascertain whether there is any nexus between the asserted difficulty in finding tenants and a potential “inability to obtain sufficient project financing”. Given that it is a normal business practice of banks and other financial institutions to lend money to developers to construct buildings prior to securing tenants or purchasers, the Applicant would also have had to demonstrate that it sought and was refused financing on that basis.

Moreover, the Board would have to be satisfied that such an inability was “due to economic and market conditions beyond the applicant’s reasonable control” (11 DCMR § 3130.6(c)(1)). Lacking any evidence of the Applicant’s efforts to secure tenants or to obtain sufficient project financing, as well as any evidence of larger “economic and market conditions”, the Board cannot assess whether any inability was beyond its reasonable control or whether more spirited efforts or alternative approaches might have borne fruit.

By failing to submit “substantial evidence” responsive to any of the criteria set out in 11 DCMR § 3130.6(c), the Applicant has failed to demonstrate that there is good cause for an extension and its Application for Extension should therefore be dismissed, or in the alternative denied.

III. Substantial changes in the material facts upon which the Board based its original approval of the application that would undermine the Board's justification for approving the original application.

The original application for zoning relief (BZA No. 18511) proposed conversion of the Property for mixed office and residential use. It proposed to add two stories to the existing one-story structure, with the resulting three-story structure reaching a total height of 39.5 feet, vastly exceeding the maximum allowed height of 12.4 feet. The D.C. Office of Planning noted at that time that "The Applicant proposes to further expand the existing non-conformity by an additional 21' to accommodate a prohibited use, an amount which substantially exceeds the maximum permitted height for the Property", and concluded that "The relief cannot be granted without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map" (BZA No. 18511, Exhibit 31).

In its public meeting of April 30, 2013, several members of the Board expressed their concurrence with the views of the DC Office of Planning and the concerns expressed by several neighboring property owners with regard to the height and the prohibited residential use. At that time, the Board began a vote on a motion to "grant the relief requested under 330.4 and deny the rest of the Applicant's request," with three Board members having orally declared their intention to deny in part (Transcript of Board of Zoning Adjustment Public Hearing & Meeting of April 30, 2013). At the request of the Applicant, the Board interrupted its vote and instead decided to "table the application to a time certain as fixed by a supplemental submission by the Applicant" (ibid.).

On May 7, 2013 the Applicant submitted its Amended and Restated Application (BZA No. 18511, Exhibit 45), in which it proposed elimination of the residential use and a reduction in height. Two artist studios, permitted as a matter of right in alley lots (11 DCMR § 2507.5), were to be substituted for the prohibited residential use. It was this Amended and Restated Application that allowed the Board to find justification for approving the relief requested. As it noted in its subsequent Order, “***Since the additional height will permit the adaptive reuse of a vacant industrial space into matter of right artist studios*** and a compatible non-residential use, the Board concludes that no impairment to the zone plan will result” (BZA No 18511A, Exhibit 5, emphasis added). The ensuing Order thus granted the relief requested in order “to allow the Applicant to [...] convert an existing automotive repair shop to an office use and ***two artist studios***” (BZA No. 18511A, Exhibit 5, emphasis added). It is clear that the Board granted the variances as part of a package wherein the prohibited residential use was taken off of the table, in favor of the matter-of-right artist studios.

On January 8, 2016, the day immediately following the submission of its present Application for Extension, the Applicant filed an application for additional relief (BZA No. 18511B). At that time, it stated that “The Applicant proposes to convert an automotive garage (the ‘Building’) into a 2-unit apartment house with an office space (the ‘Proposed Addition’). Therefore, the Applicant is seeking area variance relief from Section 2507.3, the prohibition against conversion of non-residential structures located on alley lots” (BZA No. 18511B, Exhibit 9). It argues in support of that application that “a strict application of the zoning regulations would result in a practical difficulty because despite the Applicant’s efforts, there is little demand for artist studio space” and that “the only way the Applicant

can do a viable project is through a conversion of the garage to residential/office use” (ibid.). It is therefore apparent from its own statements that the Applicant does not intend to proceed with construction of the matter-of-right artist studios that served as a crucial factual basis underlying the previous Order.

Moreover, the new Architectural Plans and Elevations it submitted (BZA No. 18511B, Exhibit 7) demonstrate that the Applicant intends the two residential buildings to be three stories in height, and even the second story of the office and residences would be higher than previously approved in the Order. This new office/residential proposal would no longer comply with the height variance that was previously granted for office/artist studio use.

The Board’s Order includes two findings of fact with regard to the proposed project that are directly contradicted by the Applicant’s submissions in BZA No. 18511B: finding 11 that “The portions of the structure on Lots B and C will each be devoted to artist studios” and finding 13 that “The existing nonconforming height, at 18.5 feet, will be increased slightly to 19.5 feet tall” (BZA No. 18511A, Exhibit 5). The Board also found, based upon the Applicant’s own testimony (BZA No. 18511, Exhibit 34), that “the contamination of the site, even if remediated, would likely preclude its use for one-family dwellings” (ibid., finding 46) – a finding that is undermined by the proposal now to substitute residential use for the matter-of-right artist studios.

These proposed changes from a matter-of-right use to a prohibited residential use and the further increase in height thus constitute “substantial change[s] in the material facts upon which the Board based its original approval of the application”, and are moreover

ones that clearly “would undermine the Board’s justification for approving the original application” (11 DCMR § 3130.6(b)). Any fair reading of the Board’s Order in BZA No. 18511 and the remarks of Board Members during its public hearings on that case would conclude that the Board granted the relief requested based upon the package proposed in the Amended and Restated Application (BZA No. 18511, Exhibit 45), and that it would not have granted relief at that time for prohibited residential use or a three-story structure.

The Applicant has thus demonstrated that the Application for Extension cannot be granted without violating 11 DCMR § 3130.6(b); its Application for Extension should therefore be dismissed, or in the alternative denied.